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THE KING'S JUSTICE IN THE EARLY MIDDLE AGES.

WILLIAM THE CONQUEROR, it is now common knowledge, no more intended, in a general way, to disturb the laws and customs of Englishmen than the East India Company to disturb those of the Hindus in Bengal. As for the law of the Church, which at that time every one both spoke and thought of as the law of God, it was binding on conquerors and conquered alike, not as Norman or English, but as Christian men; and not only William, who had prevailed partly in the strength of the Church, could not well have any will to meddle with the things of her jurisdiction, but he could never have supposed himself to have any such power. Admitting the Church to be supreme in her own sphere was not, indeed, the same thing as allowing her particular minister in the See of Canterbury, or even the servant of the servants of God who sat in St. Peter's chair at Rome, to be the sole judge of how far that sphere extended; nor did it exclude the King from claiming at least an influential voice in the disposal of ecclesiastical high places which carried with them a great deal of temporal emoluments and authority. Plenty of troublesome questions were to arise in these and such like matters in time, but not yet. The Conqueror made one sweeping innovation in the relations of Church and State. He gave the bishops the freedom of their own courts, and removed them from dealing with spiritual matters in the hundred and county courts, in the interest of the canon law

and the canonical discipline of souls.[1] He did not forbid bishops or other ecclesiastics to take part in secular justice, and they continued to do so long afterwards.[2]

Perhaps we may doubt whether the apparent and immediate gain of the Church in setting up a judicial system of her own over laymen as well as clerks, which ultimately came into competition and collision with the King's courts, was not in the long run more than outweighed by its drawbacks for both priests and people. But there could be no suspicion of this at the time.

In other respects William showed himself even anxious to confirm existing rights and customs. His ordinances, so far as known to us in substance,[3] are chiefly directed to that end; he must have allegiance and obedience, and his Norman followers must be protected from the revenge of lurking rebels; they are to be in the King's own peace. But they are to respect English laws and procedure too; the Norman trial by battle is open to an Englishman to choose if he likes, but he must in no case have it forced on him. The old rules about buying cattle before good witnesses are reasserted and strengthened; selling men into slavery abroad is again emphatically and this time, we hope, more efficiently forbidden.[4] A short-lived attempt was made to abolish capital punishment by a sort of rude compromise with humanity, substituting mutilations which now seem to us more repulsive than death. Ranjit Singh's penal justice was of the same kind when he ruled the Panjáb in the first half of the nineteenth century.[5] This, like many other passing experiments in the repression of crime, has no bearing on the general history or development of the law. But it was not a wholly strange thing in England, for a similar tendency appears in Cnut's laws.

There was nothing really new, again, in William's flat refusal to do fealty to the Pope, which he expressly put on the ground that he neither had promised it nor could hear of any of his predecessors having done it.[6] Such a demand had not been refused

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[1] See the text of his ordinance separating the spiritual and temporal courts, Stubbs, Sel. Ch. 85.

[2] In France, on the other hand, there were some curious survivals of popular procedure even in ecclesiastical causes down to the end of the twelfth century. Viollet, Hist. des Institutions politiques et administratives de la France, ii. 455.

[3] Stubbs, Sel. Ch. 83.

[4] Slave trading died hard. It was not extinct in 1102, for the Synod of Westminster had to condemn it then. See Freeman, N. C. V. 223.

[5] Stephen, Hist. Cr. L. i. 252.

[6] Stubbs, Const. Hist. i. 285.

before, because it had never been made. And if the contemporary use in England of such terms as "mandata imperialia" shows that William would equally have repudiated any claim of superiority on the Emperor's part, we may also read "basileus," which imports the same claim of perfect sovereignty, in Anglo-Saxon charters. The tradition was broken only once in the whole course of English history, and then by John, the worst of all English kings.[1]

Yet it was inevitable that the King's activity and authority should increase. William's ancestor Rollo had come to a country living under a Frankish law which, rude as it might be, was more advanced than the customs of the Northmen; and the Normans took up the speech and the laws of their new country. William and his Normans, on the other hand, came into England, a land of less advanced law, bringing a law of the same general type, but farther advanced and more defined. Whether William supposed himself to be only exercising the same rights that English kings had exercised, or assumed that as King in England he could at least have no less powers than he had as Duke in Normandy, or, as perhaps is most likely, had no theory of his powers at all, the practical result could only be to raise the English official system and English procedure to the Norman standard.

Here then was the beginning of a new system of jurisdiction. It grew and prevailed in a manner thoroughly typical of English reforms, not by any exclusive establishment, but by superior merit. The King had to do justice for some particular purposes. His justice was much stronger than any other; if costly, it was well worth the cost; and its extension was as welcome to suitors as unwelcome to those who made their profit of small folk's weakness or timidity. Not that the King's justice was offered to the people at large in the first instance; it was eagerly sought after as a privilege. Even when it became general, there was no word of abolishing the old popular courts and their procedure. They were merely superseded by the greater convenience of the royal courts, or of private lords' courts which imitated the royal methods as closely as they could; at last, and very gradually, they perished by disuse, leaving but a few traces to be swept away by systematic modern legislation. It was a century after the Conquest when the King's law was recognized in terms as the law of the land, and yet a

[1] Stephen went near it. Freeman, N. C. V. 247.

century more was to pass before it stood out as the supreme institution of English government.

Feudalism, whatever we may think of its other effects, was the first moving cause of this inestimable blessing. The King was not only ruler in peace and commander in war, but the greatest of over-lords; and the principle that a lord owed justice to the men who held their lands of him was already well established on the Continent. In the thirteenth century lawyers had become subtle enough to distinguish the King's public jurisdiction over his subjects from his private jurisdiction as lord over the smaller folk on his estates; manors of "ancient demesne" were recognized as being under a peculiar law, which, though royal, was of a private nature. But this refinement had not yet been worked out in the Conqueror's age. Then the King's lordship was vastly increased by the wholesale confiscation which followed the Conquest. It seemed only right and natural, even without the aid of any technical doctrine of forfeiture, that the King should take the lands of those who stood out against him. Much of the old book-land which had been free from any tie of over-lordship, though answerable for the greater public burdens, thus fell into the King's hand. When it was given out again to the King's followers, it was given on terms of feudal tenure; not so much on any deliberate ground of policy, as because a King of the English who had been and still was Duke of Normandy could hardly think of giving it in any other way. The practical result was great and speedy. For whoever held immediately of the King was entitled to look to the King for justice. The churches which held estates — one should rather say districts in some cases — under royal land-books of various dates continued to hold them without any substantial change. But the idea of tenure was in fashion, and it was easy to construct a bond of lordship and service out of the undefined expectations of spiritual benefits which the pious founders or donors had embodied in their verbose preambles. As the man of war must fight for his lord, so the man of religion must pray for him and for the souls of his ancestors, though neither the amount nor the value of his service could be measured by any temporal standard. So the saints themselves (for men still personified a church or foundation by the name of its patron saint) became, in such sort as they might, the King's men; and "frank almoin," *libera eleemosyna*, appears in our classical law-books as a regular species of tenure, though all the ordinary incidents of tenure, including the oath of

fealty, are wanting. Feudalism carried its point so far that bishops did homage to the Crown for the temporal possessions of their sees after election and before consecration; and they do so to this day.[1]

Here is at once a wide field of jurisdiction for the King, so much widened as to be practically new. A boundary dispute arises between a great monastery and the Norman earl who is the abbot's next neighbor; or to take real cases, the abbot of Battle, the King's own foundation, claims to be exempt from all jurisdiction and interference of the Bishop of Chichester; the monks of Gloucester claim in the name of God and St. Peter to have their rights in lands out of which they are kept by the Archbishop of York; the men of Wallingford, being jealous (as great powers may nowadays be in affairs of trade on a larger scale), disturb the privileged fair held by the monks of Abingdon; the abbot of Peterborough makes difficulties about letting the abbot of St. Edmund's have stone for repairs.[2] Who shall decide? The hundred court is not fitted to deal with such matters; a county court, or a great court of three or more counties, would be dignified enough, and in a matter of ancient customs the King may still have such a court summoned to enlighten him; but the proper and the best judge, whose judgment will really be conclusive and cannot be slighted with impunity, is the King himself, the common lord of the parties. Besides which, the King can tell best what he intended to grant, for we are not to think yet of the jealous caution of the latter days in which the judicial right hand may not know what the executive left hand doeth. And this eminence of knowledge will, as the course of time requires, be extended to the grants of the King's pious ancestors.

Thus we find the King, before his court can be called an organized tribunal, already dispensing a justice which, if not of common right, is not merely of favor. He is not yet bound by forms; he may hold a meeting of his counsellors, or he may order the proper county court to investigate complaints of encroachment by his own officers on the immunities of a religious house.[3] On

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[1] Anselm's homage to William Rufus, in 1093, is mentioned as a thing already settled by precedent: "More et exemplo praedecessoris sui inductus pro usa terrae homo regis factus est." Eadmer, page 41 of Rolls ed. The words "I become your man" were omitted in the form used later; it is not certain that Anselm used them.

[2] Bigelow, Plac. Anglo-Normannica, 14, 29, 32.

[3] Ib., 30–31.

the other hand he may sometimes, on being satisfied of the facts, issue a direct mandate which is both judicial and executive. One way or another, he hears and determines what may be called privileged causes, and his experimental or occasional methods are the starting-point of the procedure which his successors will elaborate. We must not look for a settled plan in the Conqueror's judicial or semi-judicial orders. At one point they may seem to the modern lawyer to resemble a judgment on appeal, at others an order for a trial before special commissioners, or for a new trial on cause shown, at another an injunction obtained at short notice; but the resemblances to anything in latter-day practice are too fitful and precarious to help us much. Gradually, however, what was at first occasional became frequent in matters of recurring need, and what was proved to be of practical utility became customary. The custom of the King's court hardened into rule, and within a century there was a distinct beginning of the system of writs and forms of action which was to fix the lines of the common law.

The great commission of inquiry which recorded the taxable values of England twenty years after the Conquest, and whose report is preserved in Domesday Book, had no direct concern with any law but what we should now call revenue law, and only gives us occasional light by its incidental notices of disputed claims. Its problems really belong to the Anglo-Saxon period much more than to the Anglo-Norman, and to the student of economic history at least as much as to the lawyer. But the form of the Domesday inquest has an importance for the historian of law quite apart from its matter. We mark here the first appearance on English ground of a new means of getting authentic information. A report is made on oath by men of the place concerned, city, borough, or township, who are in a position to know the facts; it consists of answers returned to questions or articles of inquiry so drawn up by skilled persons as to make it plain what information is wanted; it follows the lines of the inquiry, and is recorded on a methodical plan; but there is nothing absolutely formal about it, and nothing to prevent explanatory matter from being added. Also "the machinery that furnishes the jurors," the existing taxable arrangement of hundreds and townships, "is native."[1] Thus the example was easy to be followed and likely to spread. The royal procedure

[1] Stubbs, Const. Hist. i. 275.

was imitated, in the course of the next century, by other great lords of lands. The princely bishop of Durham and the abbot of Peterborough in the northern parts, the dean and chapter of St. Paul's in the region north and east of London, the abbot of Glastonbury in the south, caused the state of their domains to be recorded on a system generally similar to that of Domesday Book. By the time of Henry II. the sworn inquest must have been a pretty familiar institution of estate management all over England, or, we may almost say, of local government, for the two things, outside the towns, are hardly distinguishable in the English polity of the twelfth century. Thus the way was cleared for the great reforms in legal procedure which began under Henry II. It was kept clear also, from another direction, by the English reaction, still obscure to us in many of its details, which took place after the accession of Henry II.'s grandfather, first of the name.

In William Rufus's time there had been no justice to be found at the king's hand and not much law, though it was not a period of anarchy such as had yet to be endured under the nominal rule of Stephen. The desire of a people oppressed and taxed by strangers was for restoration of their ancient customs. And that restoration was promised them by Henry I., no doubt in all good faith, when at the end of the eleventh century he came to the throne, and in the plainest terms admitted the grievance and repudiated his brother's course of exactions.[1] The customs of Edward the Confessor's day, with William I.'s not very large amendments, were declared valid. "Lagam regis Eadwardi vobis reddo cum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum." Such were the King's words; he purposely spoke of *laga*, the Anglo-Danish customs, not of some *lex* which might have been a new foreign thing. His marriage with a wife who brought the ancient royal blood of Wessex into the succession was a further earnest of national revival. The movement was deep and genuine, as we know by the best of evidence, the jealousy of the Norman courtiers who scoffed at the English goodman and goodwife. On the legal side, it took shape in industrious and more or less honest endeavors to reconstruct the customs of Edward the Confessor from Anglo-Saxon documents, and interpret them for the benefit both of clerks and officials who knew little English of any kind,

[1] "Quia regnum oppressum erat iniustis exactionibus." Coronation Charter of Henry I., sec. 1; Stubbs, Sel. Ch. 100. A critical text was published by Dr. Liebermann in 1894. Trans. R. Hist. Soc. N. S. viii. 21, 40.

and Englishmen for whom the language of Alfred's time, if not of the Confessor's, was ceasing to be intelligible. These works were partly mere compilation of earlier documents executed with tolerable faithfulness, though not always with adequate knowledge; partly attempts at restating the old customary laws, with improvements of detail and explanation, in the form of a continuous text-book; and, in one well-known case, a mixture of half-understood fact with impudent fiction, which brings in, amongst other strange matter, a legend of King Arthur of Britain having conquered and converted Norway and the Baltic lands as far as Russia.[1] This ingenious way of disguising the Danish conquest of England seems to have been too bold even for twelfth-century readers; Malory's picture, three centuries and a half later, of Arthur receiving the keys of Rome from the "Potestate" is more plausible.

These books, however, or portions of them, certainly supplied a want and had a considerable vogue. If they had been mere exercises of students, they would not have been preserved as they have been. For a time some of them were probably used as books of practice, though the actual usage of the court must always have prevailed. From this quarter we hear nothing of the King's new jurisdiction. The writers were concerned only with the old custom, and they apparently believed, or hoped some one would believe, that there were still different bodies of provincial custom not only for the Danelaw and for the rest of England, but for Mercia and Wessex.[2] Antiquarianism is mixed with little bits of rationalizing and occasional attempts to show off foreign learning in a way that makes it very difficult to know how much is to be taken seriously. But in any case we have to do here with a real wave of national feeling, curiously enough almost coinciding with that first general revival of letters after the Dark Ages which has been called the lesser Renaissance. It was strictly national as not being confined to any class; it was active in the mind and in the words of many who hardly knew the English tongue. From this impulse men took

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[1] Such are in brief the characters of (*a*) the "Quadripartitus," only of late known to us in its proper form, and to some extent the "Leges Willelmi;" (*b*) the "Leges Henrici Primi;" (*c*) the "Leges Edwardi Confessoris," which pretend to be an authentic return of the old customs made under William I. See P. & M. i. 76–82. Roughly speaking, the veracity of a book of this kind varies inversely as the authority of the writer claims for it. None of the writers seem to have been of English speech or race.

[2] We know that the local courts had their own different usages; but nothing is said of larger provincial customs in any authentic source of information after the Conquest.

heart and strength, we may well believe, to set themselves in the future against all attempts to introduce foreign methods of justice. English law had to develop itself with native resources, and was driven to be inventive. It might borrow on occasion, — some leading men were prepared to borrow more than posterity approved of, — but it was not to be displaced. The King's justice, with all its innovations in form, was really the strongest guardian of the national law; for the central power of the King's court moulded the law to uniformity. What might have become a number of feeble provincial customs became the one and indisputable law of the land. The foundation laid by Henry I. was submerged in the horrible anarchy of Stephen's time but not removed. Henry II. was able to take up the work where his grandfather had left it, perhaps all the more efficiently by reason of the crying need for a king who could and would govern.

Whatever faults Henry II. may be chargeable with, incompetence or indolence in the duties of his office cannot be reckoned among them. He was not only an active ruler and a master of administration, but a statesman, a scholar, and a lawyer; and he had the gift, by no means always found in conjunction with personal ability, of attracting the best men to his service. The moulding of royal justice into settled forms which took place during the reign was due, to a large extent, to Henry's own invention. He had a free hand for experiment and improvement; forms were still elastic, and the formal division of labor in high offices was not yet fixed, so that creation of new functions and redistribution of old ones met with no great difficulty. So far indeed was the official system from being complete, that, if we may judge by the gaps in our extant materials, it was not uncommon for the King to make rules, or even what we should now call enactments, of first-rate importance, of which it was nobody's business — or, what amounts to the same thing, not known to be any certain person's business — to keep a permanent record. But, on the whole, we find the benefits of methodical procedure in the hands of skilled officers increasing and appreciated; they are more than once or twice extolled by contemporary writers.

The King's court or council — so far we may call it either — was in the Anglo-Norman period essentially what it had been before the Conquest; namely, the King himself, and as many of the great men, bishops, and abbots as happened to be on the spot. Henry II. did not altogether abandon the custom of doing

judicial business in such assemblies, in which he not merely presided but took an active part.[1] At times he seems, like the Conqueror, to have given executive orders on the strength of his own information without any regular judicial hearing. On one occasion early in his reign[2] he directed his chief justiciar, the Earl of Leicester, to hold an inquest of Berkshire, and ascertain by the verdict of twenty-four ancient men what were the rights of holding a market enjoyed by the abbot of Abingdon in the time of Henry I., the men of Wallingford and Oxford having disputed the abbot's claim. A court was held at Farnborough, and the jurors declared in the abbot's favor, but some of them were objected to for being his servants or tenants. The King ordered another court to be held at Oxford, each side to chose its own jurors. The jurors of Oxford, of Wallingford, and of Berkshire generally made separate and, as perhaps might have been expected, discordant returns. The Earl gave no judgment, but reported to the King his own knowledge that he had lived at Abingdon as a boy and seen a full market there not only in Henry I.'s time but earlier. The King, "pleased to have so eminent a witness," acted on this without hesitation, and sent the Wallingford and Oxford people about their business in a summary manner when they came to him at Reading. Again, the court which declared Archbishop Becket in contempt in 1164 was a miscellaneous court of the King's barons.[3] A distinction which occurs quite naturally to the modern reader, namely, that this controversy was rather political than legal, would at the time have seemed equally irrelevant, and have been about equally unacceptable, to both parties.

It must not be assumed that the King's personal attention to causes brought before him was an unmixed benefit. When obtained, it was effectual; but the need for obtaining it, and for that purpose following the King's constant movements not only in England but beyond England, could in the earlier part of Henry II.'s reign be a cause of grave delays. Richard de Anesti's well-known account of his adventures in recovering his uncle's land[4] shows about five years consumed in what might indeed be

[1] See the case of Battle Abbey *v.* Gilbert de Baillol, Bigelow, Plac. A.-N. 175; and the renewal of the same Abbey's charters, ib. 221, where the King made a point of proceeding judicially.

[2] *Op. cit.* 201.

[3] Ib. 214.

[4] Palgrave, English Commonwealth, ii. pages ix, lxxv; abridged in A.-N. 311; Hall, Court Life under the Plantagenets, 98, 250.

called suing and laboring. We must remember, however, that this was an exceptional case, as it turned on a question of marriage, a matter of ecclesiastical jurisdiction, and thus involved references backwards and forwards between temporal and spiritual authorities, including two expeditions to Rome; not to mention that it was contested with large means and probably no excess of scruple on either side. Also measures of time and speed are relative, and people had not learnt to be in a hurry in the twelfth century. Cost is much more the burden of Anesti's tale than delay.[1]

But though he kept indefinite powers of amendment in his own hands, and never treated himself as actually bound by his own rules, Henry II. did lay down the lines on which future development was to proceed, and left them so settled that, while much was added in the thirteenth century, we can hardly say that anything material was taken away. The King's general right of sending out commissioners authorized to inquire and report, or to act in the King's name, or both, was used in the systematic appointment of travelling or "itinerant" judges, justices "in eire" as official Anglo-French called them. The ordinance known as the Assize of Northampton defined their functions in 1176; they were to see to the enforcement of criminal law and the Crown's dues of all sorts, to require a general oath of fealty (no mere formal matter after a dangerous rebellion), and to administer the remedy newly devised by the King's wisdom, of which we shall have to speak further on, for quieting men in their possessions. Eighteen judges were assigned, three to each of six circuits; but the King's seal for justice went too fast for his people, and the number was complained of as oppressive; nor is this surprising when we remember that the justices travelled with a considerable retinue, and at the expense of the places they visited. In 1178 a permanent body of five, two clerks and three laymen, chosen from the King's immediate following, was appointed to remain at the King's court and hear suits, reserving only cases of special difficulty for the King himself in Council.[2] This probably was meant to lighten, and did lighten, the work of the justices in eire; that work was far too necessary to be dispensed with, and, under changes of

[1] He had to borrow money to carry on his suit at rates varying from about 80 to about 60 per cent per annum (4*d.* or 3*d.* per week for £1), sometimes only about 40 per cent (2*d.* per week for £1).

[2] Sel. Ch. 130, 131.

form and title, has continued without interruption down to our own day. We have here then the two capital elements of royal justice, — a tribunal of learned persons attached to the King's court (though not yet fixed to any certain place, but dependent on the King's movements), and judicial commissioners armed with the King's plenary authority, representing his dignity as inseparably associated with the dignity of the law, who render justice in his name in every part of the kingdom. We have even a beginning of the jurisdiction of the House of Lords — properly the King in Parliament — as a court of last resort.

At the same time the King was enlarging his judicial powers by the institution of new remedies in civil affairs. One of the great problems of medieval justice was to prevent men from taking the law, or what they supposed to be law, into their own hands. It must have seemed in many parts of England at many times a less risky thing to settle a question of title or boundaries in one's own favor and by one's own strength than to invoke the tardy and cumbrous aid of the hundred or the county. Thus the prohibition of self-help is among the first cares of princes who mean to leave the name of having kept good peace; and endeavors in this direction may be observed even before the Conquest. But a power that can effectually forbid men to redress themselves by the strong hand can no less effectually forbid the provocation, and furnish lawful aid for those who are disturbed in their peaceful enjoyment; and in order to justify its reforms it is bound to do so. The King must put forth his strength for right if private violence is to be without excuse. For such reasons Henry II. and his counsellors, not without long thought and watching,[1] devised a speedy remedy for the protection and quieting of possession, to be administered by the King's judges over the heads of both popular courts and intermediate lords. Introduced as it was by an "assize" or special ordinance, perhaps made at the same council as the Assize of Clarendon in 1166,[2] this remedy for unjust dispossession (and all dispossession save by regular judgment was counted unjust)[3] became known as the "assize of novel disseisin."

[1] "De beneficio principis succurritur ei (disseisito) per assisam novae disseisinae multis vigiliis excogitatam et inventam." Bract. 164 b. The Grand Assize had already been described as "regale quoddam beneficium clementia principis de consilio procerum populis indultum" in the well-known passage of Glanvill, ii. 7, Sel. Ch. 161.

[2] P. & M. i. 124.

[3] *Op. cit.* ii. 51. In 1192 Abbot Samson's monks at St. Edmund's wanted him to turn out some townsmen who had encroached on abbey land in the town; he told

It was the eldest brother of a family of actions, and the procedure by assize in every form has a double importance. The justice it offers to the people is emphatically the King's justice; and, moreover, it operates by the modern and royal method of inquest on oath. There is not a doom given by the suitors of the court, but a judgment of the King's judges on the return made to their inquiry by lawful men who vouch for the facts. In considering this kind of action as familiarizing and extending the new mode of trial on the merits as against the formal procedure of the ancient courts, we must remember that "it soon became an exceedingly popular action."[1] It made a great advance in both speed and efficacy on any remedy then existing; it might have continued popular, and escaped the fate of becoming in its turn antiquated and cumbrous in the eyes of later generations,[2] if its benefits had not been confined to freeholders.

More than this, for interfering with old forms was in the twelfth century a bolder stroke than making new ones, Henry II. applied the new procedure to the action for determining title to land as distinct from immediate possession, "the great and final remedy of a writ of right."[3] We know so little of dealings with land other than book-land in Anglo-Saxon courts that it is impossible to say what more archaic forms, if any, the writ of right supplanted; but such as Henry II. found it, the process was Anglo-Norman, assumed feudal relations of tenure, and led — after many possible delays — to a decision by the regular Anglo-Norman method of proof, namely, battle. But now the King intervened, taking thought, as a prince tender of his subjects' welfare, for men's lives and the safety of their estates.[4] The tenant in possession challenged by a claimant might "avoid the doubtful chance of battle" by "putting himself on the King's Great Assize;" that ordinance enabled him

them he dared not act without the judgment of a court; disseising free men who were in actual possession, right or wrong, meant being in trouble with the King for breaking the assize (quod si faceret, dicebat se cadere in misericordiam regis per assisam regni). Joc. de Brakel. page 57.

[1] P. & M. ii. 47.

[2] There is no difficulty in finding a parallel. In discussing the somewhat analogous remedy called *possessorium summarium* or even *summariissimum* in modern Roman law, Savigny reported of his own knowledge an instance where the *summariissimum* had lasted twelve years without any prospect of an end. Recht des Besitzes, 7th ed. 1865, page 534.

[3] Blackst. iii. 191.

[4] Glanv. ii. 7. The exact date is unknown, nor is the text of the assize itself preserved.

at his option to claim a decision by an inquest of knights. Four knights were first named by the sheriff, and proceeded to choose other twelve,[1] and the twelve had to declare on oath which party had the greater right in the land (or other subject-matter assimilated to land) held by the one and claimed by the other. By this innovation the King and his learned advisers really committed themselves to two positions: first, that it should be possible to settle men's disputes by some rational way of ascertaining the truth; secondly, that trial by battle, though it purported to be an appeal to the judgment of God, was not a rational way. The King who takes this on himself is no longer a mere supervisor or executive chief; he is the guardian and director of justice in his kingdom.

Not that trial by battle forthwith went out of fashion. Only the defendant[2] could claim the trial by assize. He would naturally do so if he felt confident in the justice of his case. But if he had a bad case, or one which he thought likely to seem bad for any reason, it was his interest to let things proceed in the old course, and make the best compromise he could at the last moment before the judicial combat; and this appears to have been done from time to time almost as long as the writ of right was in practical use.[3] Determination of the issue by battle actually fought out, though not uncommon throughout the thirteenth century in cases of criminal "appeals," was the exception, it is believed a rare exception, in the writ of right.

Here as elsewhere the rule holds that the King's justice in men's private affairs is at first a matter of grace, except where on

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1 This indirect election of the jurors appears designed to prevent collusion between either party and the sheriff. In later practice the four knights chose themselves and a number of others, making up in the whole sixteen (Y. B. 30 & 31 Ed. I. 116) or twenty-four, of whom sixteen acted (Blackst. iii. Appx. 1, § 6); but Glanvill's text looks as if the first four were originally not allowed to elect any of themselves; and the practice was still the same in Henry III.'s reign, Bract. 331 b.

2 Properly "tenant," but the technical distinction of terms is not worth preserving unless one is studying the forms of pleading in detail.

3 In some recorded cases of this kind the proceedings may have been collusive from the first, and the combat only a more dramatic forerunner of the pleadings in the "common recovery" of the developed real property law. P. & M. ii. 96. See a very full fourteenth-century example of a trial by battle compromised when the champions were in the field, Dugd. Orig. 68. The duel of chivalry under the Earl Marshal's jurisdiction, mostly in cases of "transmarine treason," was different in origin and character and outside the common law. As to this see Selden, Duello, c. 11, extracted in Dugd. 76 *sqq.*; Neilson, Trial by Combat, 160–207.

feudal principles he is bound as lord to do justice — not royal but seigniorial justice, strictly speaking — to his men who hold lands of him and owe him service. The benefit of the King's ordinance must be expressly sought by those who want it; if not, the old customary law takes its course.

There was another function of the King's court which became prominent in the latter half of the twelfth century; that of recording solemn compromises between parties. As early as the time of Henry I. we find the King arranging terms between eminent persons by his own authority or influence, and setting the terms down in a writ.[1] Under Henry II. it became common for parties who had made their own terms to come before the King's judges to have them recorded. Such a record had all the value of a judgment in both certainty and efficacy; so that it was worth while for purchasers of lands to simulate a dispute with their vendors for the purpose of having their "final concord" registered in authentic terms by the King's judges. Hence arose the form of "common assurance" which flourished for the best part of seven centuries under the name of a Fine. The details belong rather to the special history of the law of real property; but there is no doubt that the services of the King's court to landowners in this respect, anticipating, as best might then be done, the modern devices of registration, were among its chief claims to the esteem and — what was perhaps more to the King's purpose — the resort and fees of suitors.

Also the King's court appears from Henry II.'s time, if not earlier, as guarding the subject's personal liberty — not merely freedom from wrongful imprisonment, but the condition of a free man. A strayed villein may be claimed by his lord in the county court; but if the man raises the defence or preliminary exception that he is a freeman and no villein by blood, and gives due security to the sheriff for prosecuting this claim, the proceedings must be removed into the King's court, and become in effect an action wherein the alleged villein is plaintiff and demands to have his freedom declared. Meanwhile he is to be treated as a free man;

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[1] Cart. Rams. (Rolls ed.) i. 236–7, Nos. 155, 156, about A. D. 1110, directed to the bishop of Lincoln and county of Huntingdon; the form is "Sciatis me fecisse conventionem," etc. Thirteenth-century fines in the same book, *e. g.* No. 34, page 127, are in the form settled not later than Glanvill's time. See Glanv. viii. 23: "Haec est finalis concordia facta in curia domini regis," etc. And see P. & M. ii. 96. The official preservation of a counterpart appears to date from 1195.

"he shall be in seisin of freedom" — a phrase worth remembering for the light it throws on medieval habits of thought. Freedom, like land, is not everybody's to enjoy. It is a thing of value, and as such it can be possessed, inherited, or released from adverse claims by a charter.[1] It would perhaps be rash to attribute a great part to humanitarian motives in this royal jurisdiction. False claims of villeinage might well be calculated, if not designed, to deprive the King or other lords of tenants and services; even false confessions of villeinage to avoid an immediate adverse judgment were not unknown. But a court which interferes in these matters on the side of freedom, when it interferes at all, must appear in a favorable light to those who are benefited by its action, whatever the ultimate grounds may be. The King had the credit of protecting men in their persons as well as in their possessions against the hand of the spoiler. *Deposuit potentes de sede et exaltavit humiles.*

Payment of money due, where there was nothing else in issue, seems to have been enforced by the King's court only by way of exception, and not as a matter of regular duty, down to the middle of the thirteenth century. Long afterwards the judges were still anything but sure of their footing in this region; more than once or twice they lost heart and turned back from a promising line of advance; and it was only in the latter half of the fifteenth century that the formidable rivalry of the canonists, who were drawing business from them to the Church courts, drove them to acquiesce in the invention of a comprehensive form of remedy for breaches of agreement. But the bold creations of Henry II. had effectually laid the foundations of the King's justice as an expansive power before the end of the twelfth century. The shocks which the King's personal influence received through the perversity of John and the weakness of Henry III. left this untouched; and in the latter years of the thirteenth century the wise policy of Edward I. consolidated his ancestor's work into a system of exceeding strength and stability. Then, and for long afterwards, the King's justice was by no means the only justice in the realm. But from the days of Edward I. at latest it was destined to overshadow all rivals.

Frederick Pollock.

[1] Glanv. Book. V. is the authority for all this. The treatment of an affirmative exception as a preliminary counter-claim is not anomalous in itself, but rather characteristic of medieval dialectic. It persisted in Scotland down to modern times. See L. Q. R. ix. 274.